

Governance Duties and Conflicts of Interest in the Charities Sector: Australia and England & Wales Compared

Rosemary Teele Langford and Malcolm Anderson

(2022) 28 *Third Sector Review*

Rosemary Teele Langford is professor, Melbourne Law School, University of Melbourne. Malcolm Anderson is researcher and statistical consultant, Melbourne Law School, University of Melbourne. Our thanks to Miranda Webster for assisting with development and administration of the survey. This research is funded by the Australian Government through the Australian Research Council.

Abstract

This article reports the results of an extensive survey of persons who govern charitable entities in Australia and in England & Wales in relation to governance duties and conflicts of interest. The results help discern respondents' understanding of, and confidence with, their governance duties, their enthusiasm for practical assistance with these duties, the strength of their conflicts management procedures, as well as compliance motivations and perceived barriers to enhanced governance and compliance. This in turn assists in critical evaluation of the effectiveness of the governance and regulatory system in each of Australia and England & Wales, and enables valuable comparisons between the jurisdictions in this respect.

Introduction

In 2012 a new governance and regulatory framework for charities was introduced into Australia with the advent of the Australian Charities and Not-for-profits Commission (ACNC) (see ACNC Act 2012; ACNC Regulations 2013). There is widespread recognition that this framework gives rise to inconsistencies, incoherence, gaps in coverage and problematic interaction with other legal obligations (see, e.g., Brand et al. 2013; Heesh & Lobow 2015; Aroney & Turnour 2017; Ramsay & Webster 2017; Murray 2019). Key problems include the multiple layers and sources of governance duties and the

inconsistencies between these duties (arising from Australia's federated system and the lack of a referral of power), as well as the fact that the core obligations imposed by the ACNC are imposed on charitable entities rather than on the responsible persons who govern charities. As a result, the Australian charitable sector struggles with a complex governance system that lacks clarity and coherence. This confusing system can be contrasted with that of England and Wales which is more coherent, with a more straightforward system of governance obligations, a more expansive Charities Act, as well as a Charity Governance Code (with or without diagnostic tool), and more prescriptive Charities Commission (CCEW) guidance concerning conflicts of interest (see CCEW 2012: 17–19 [6.3], [6.4]; CCEW 2014; CCEW 2020. For ACNC guidance, see ACNC 2015a).

This article represents the results of empirical research on the effectiveness of the governance and regulatory framework in each of Australia and England and Wales. Surveys were undertaken in both jurisdictions to enable comprehensive critical comparative analysis. This enables a comparison to be drawn to ascertain whether the more coherent English system in fact leads to a better understanding of duties and superior dealing with conflicts in practice. In other words, does the less complex framework and clearer Charities Commission guidance in England and Wales make a practical difference?

Despite consistent national interest in the not-for-profit sector (as evidenced by four national inquiries), there is a clear absence of empirical studies into the governance framework of charitable entities. Commentators have drawn attention to the lack of studies from Australian researchers into not-for-profit governance, and particularly empirical research into governance challenges (see, e.g., Moi et al. 2014; Chelliah et al. 2016), with Chelliah et al

stating that ‘there is a dearth of academic research on the governance challenges faced by Australian not-for-profit organisations’ (Chelliah et al. 2016: 4).

Methodology

An interactive survey was created using SurveyMonkey following ethics approval and pilot-testing directed at responsible persons (Australia) and charity trustees (UK).¹ The survey was kept as short as possible (with an estimated completion time of 14 minutes for the Australian survey and 16 minutes for the UK survey) to encourage maximum responses. The survey collected quantitative and qualitative data beginning with a series of demographic questions, followed by questions assessing respondents’ understanding of their duties, barriers and motivations in relation to compliance, how conflicts are managed and understanding of conflicts of interest.

Participants were recruited as follows. First, survey links were distributed by peak sector bodies and charity law practitioners and contacts either via newsletter or email. Second, the research team researched the details of individual charities using the charities register in each jurisdiction and sent emails with survey links to them.

In probing governance and enforcement frameworks and testing reform proposals, the surveys focused on two aspects. The first aspect tested respondents’ level of understanding of their governance duties.² This aspect was chosen because the ACNC governance framework has been criticised as resulting in increased complexity and reduced accountability for individuals working for registered charities (see, e.g., Ramsay & Webster 2017). The second aspect probed how charities deal with conflicts in a practical sense—in terms of what protocols are in place, how often the issue of conflicts of interest arises and when conflicts do

arise, how they are dealt with. This aspect was included because conflicts of interest are a key governance issue and one that is highlighted by the ACNC in its compliance reports (see, e.g., ACNC 2015b: 9, 17, 18; ACNC 2017: 17; ACNC 2018: 2; ACNC 2019: 28). Conflicts were also chosen due to their centrality in governance and their presence in general law, statutory and regulatory requirements. Moreover, the extent to which non-pecuniary and third party conflicts are encompassed within general law is unclear—ascertaining respondents' views on this is therefore instructive.³ Management of conflicts is also indicative of broader understanding and compliance. The surveys help to develop a clearer picture of compliance motivations and perceived barriers to enhanced governance and compliance.

The total number of useable responses totalled 419 from Australia and 369 from England and Wales. As the method of contact was by way of notice to the respective peak bodies as well as word-of-mouth and personal solicitation, it is not possible to formally calculate a response rate. Of the Australian responses, the number answering individual items ranged from 397 to 418 for the demographic items (347 to 366 for England and Wales). Slightly less completed the survey to the end, so those answering the hypothetical examples (the last three questions on the surveys) was a minimum of 310 (Australia) and 270 (England and Wales).

As a rough guide, the standard error for 328 responses (for determining, for example, an estimate in the *population* returning a particular response) is plus or minus 2.8 percentage points; the 95 percent confidence error is plus or minus 5.4 percentage points (for the Australian responses for relevant likert items). The corresponding standard error for 298 responses (England and Wales) is plus or minus 2.9 percentage points with a 95 percent confidence error of plus or minus 5.7 percentage points. While reasonable effort was made to ensure that the samples returned were as representative of their populations as possible, we

must allow that self-selection (that is, those inclined to respond or where personal contact facilitated a response) played some part in introducing a probable skew in the final sample composition. While efforts were made to ensure a representative population cross-section, we believe that some under-sampling of both smaller charities and religious-based entities should be declared as a note of caution. While Table 1 (legal entity) and Tables 2a and 2b (size of entity) below should be interpreted pre-eminently as a description of our samples, we believe them to be, with some exceptions, broadly reflective of the underlying populations.

A number of statistical techniques were employed to see if the differences in the respective samples would hold for (the Australian and UK)⁴ populations including *chi square tests of independence* and *t-tests*. Other multivariate analyses were employed where relevant including *principal components analysis*, *correlation*, and *reliability analysis* with *Cronbach alpha* statistic, together with *multiple regression* and *logistic regression*.

Demographic Differences: The Entities

Demographic items are divided into those pertaining to the individual filling out the survey, and more relevant details about the entity itself. Turning to the latter—the entity itself—it was clear that the legal structure of charities in Australia differs markedly from those in the UK. Table 1 indicates that the great majority of charities in the Australian sample show that two legal arrangements predominate—company (28.7 percent) and incorporated association (51.7 percent). In the UK sample, by way of contrast, companies (only 12.0 percent), Charitable Incorporated Organisations (46.7 percent) and trusts (24.0 percent) account for the legal structure of four out of five charities. The CIO structure (which is specifically designed

for charitable entities) is very popular in the UK (see, e.g., *Lehtimäki v Cooper* [2022] AC 155: [94]).⁵

Table 1: Legal structure of the organisation

Legal Structure	Australia (%)	Stat test Aust v UK	UK (%)
Company	28.7	**	12.0
Incorporated association	51.7		
Charitable Incorporated Org			46.7
Trust	3.6		24.0
Trustee company	0.5		1.6
Co-operative	0.5		
Community Benefit Society			0.8
Unincorporated association	2.9		4.9
Friendly Society			0.3
Statutory corporation	3.3		0.0
Do not know	3.8		2.7
Other	5.0		6.8

Notes: Statistical test (third column): ** statistically significant at 0.01 level (Chi-square test of independence).

Only the proportion of entities structured as ‘companies’ (first row; statistically significant at the 0.01 level) was tested. The option of Aboriginal and Torres Strait Islander Corporation was included in the Australian survey but no respondents chose this option.

The size of the entities was not directly comparable (one categorised by revenue in Australian dollars; the other in pounds sterling); Tables 2a and 2b gives the relevant breakdown. Board sizes were broadly alike, the median number of members being eight in both regions (Table 3), though more of the UK entities had more than ten members on their boards (26.2 percent);

for the Australian charities it was just 16.1 percent. Table 3 indicates that the average board size in the jurisdictions is nevertheless very similar.

The broad purposes of the charities were also virtually identical: 12.9 percent of the Australian charities self-designated as religious (13.8 percent in the UK); 18.6 percent health, age care or disability (17.6 percent of UK); and 8.8 percent education (10.8 percent in the UK sample). None of these differences between countries was statistically significant.

The percent indicating that either board members or ‘their associates’ were *paid* (for various services) differed depending on the main purpose of the organisation but was very similar overall between the Australian (15.4 percent) and UK samples (11.1 percent)⁶. There was some variability depending on the purpose of the organisation: typically, the proportion reporting that board members or their associates were paid was higher for religious entities (22.2 percent for Australia; 17.6 percent for the UK).

Table 2a: Annual revenue of organisation (Australia)

Revenue (Aust dollars)	Australia (%)
Under \$50,000	12.6
\$50,000 to < \$250,000	17.7
\$250,000 to < \$1 million	24.6
\$1 million to < \$10 million	26.4
\$10 million to < \$100 million	14.5
\$100 million or more	4.2

Table 2b: Annual income of organisation (England and Wales)

Revenue (Pounds sterling)	UK (%)
£10,000 or less	18.4
Over £10,000 but no more than £25,000	15.5
Over £25,000 but no more than £250,000	34.7
Over £250,000 but no more than £1 million	10.5
Over £1 million	20.9

Table 3: Size of organisation board

	Australia	UK
Median	8.0	8.0
Mean	8.1	8.6

Demographic Differences: The Respondents

Turning to the characteristics of the respondents themselves, a few items of interest deserve comment. The *age composition* of respondents varied between the two countries (see Table

4): the main finding is that more of the respondents in the UK were aged 55 or over (75.4 percent) as opposed to only 65.7 percent of Australian respondents. Nevertheless, the duration respondents have held their current responsibility was very similar across the two surveys: 24.4 percent of the Australian respondents had been in the job over ten years, while it was 27.3 percent for the UK sample. Interestingly, far more of the Australian respondents were paid full-time employees (21.4 percent; only 5.9 percent in the UK sample), while nearly three-quarters of UK respondents were unpaid/volunteers (77.2 percent; just 53.4 percent of the Australians). More of the Australian respondents were senior staff or managers (21.7 percent) than of those in the UK sample (12.4 percent) (Table 5).

Table 4: Age group of respondents

Age Group	Australia (%)	UK (%)
Aged 18 to 24	0.7	0.3
Aged 25 to 34	3.2	2.8
Aged 35 to 44	9.6	7.6
Aged 45 to 54	20.7	13.8
Aged 55 to 64	34.1	29.7
Aged 65 and over	31.6	45.8

Notes: Difference between total percentage aged 55 and over (65.7 percent, Australia; 75.4 percent, England and Wales) statistically significant at 0.01 level (Chi-square test of independence).

Table 5: Position of respondents within the organisation

Position within organisation	Australia (%)	Stat test Aust v UK	UK (%)
Paid full time	21.4	**	5.9
Paid part time	8.6		5.6

Unpaid/Volunteer	53.4	**	77.2
Executive/Senior Manager	21.7	**	12.4
Other position	17.5		19.4

Notes: Statistical tests (third column): ** statistically significant at 0.01 level (Chi-square test of independence).

Respondents could indicate multiple position self-descriptions, so totals will be in excess of 100 percent.

General Questions on Considering the Entity’s Purpose in Decision-Making

There was little doubt that respondents closely connected board deliberations with the entity’s purpose—and these considerations were the same across the two national surveys. To the question whether or not boards considered the entity’s *purpose* in its decision-making: the ‘rarely’ or ‘never’ options were extremely low (both 2.1 percent). The combined proportion reporting ‘always’ or ‘usually’ was high in both jurisdictions (95 percent for Australian respondents; 93.1 percent for those in the UK). Testing this is important given that purpose plays a central role in the charities sphere (and particularly in governance of charities) (see, e.g., Charities Act 2011: s. 1; ACNC Regulations 2013: reg. 45.5(2); *Charities Act 2013*: s. 5; Langford 2020b).

General Questions on Governance

A suite of propositions was presented regarding respondents’ understanding of governance and board practices in respect of the running of their organisation. Testing these aspects is important given that monitoring the entity’s financial position is a particularly important aspect of governance duties, particularly in terms of the duty of care and duties associated with insolvent (or fraudulent) trading. Table 6 shows the percentage agreement to each of these propositions. Respondents believed that they possessed both a clear understanding of governance duties (both above 95 percent agreement for both Australian and UK

respondents) and financial accounts (also more than 95 percent agreement). They agreed that their boards are regularly updated on the organisation's financial position (also above 95 percent agreement for both regions). About a quarter of Australian respondents relied on 'someone else' to take responsibility for the entity's financial position versus a third of the UK respondents.

A significant divergence in national outlooks was revealed in governance duties training and whether respondents have read either the ACNC (for Australia) or Charity Commission (UK) guidelines on governance duties. As Table 6 shows, many more in the Australian sample have received such training (72.4 percent; just 59.5 percent of the UK group), while an overwhelming majority of the UK respondents have actually read the regulator's guidance (91.8 percent) as opposed to just 78 percent of Australian respondents.

Table 6: Governance duties

	Australia (%)	Stat test Aust v UK	UK (% Agree)
	Agree)		
I have a clear understanding of the governance duties to which I am subject.	95.6		96.1
I have a good understanding of the organisation's financial accounts (profit and loss/balance sheet).	95.1		95.1
I rely on someone else to take responsibility for the organisation's financial position.	25.9	*	34.5
The board is provided with regular updated financial information.	96.2		95.1

I have received training and guidance in relation to my governance duties.	72.4	**	59.5
I have read ACNC/Charity Commission guidance on governance duties.	78.0	**	91.8

Notes: Figures sum 'strongly agree' with 'agree'. Statistical tests (third column): * statistically significant at 0.05 level; ** statistically significant at 0.01 level (Chi-square test of independence).

A further suite of questions presented more negatively worded propositions about whether or not respondents understood where to find such guidance, together with items on reasons why they felt it difficult to keep up with the regulatory material. But overwhelmingly, respondents felt themselves quite informed and knowledgeable about governance duties, and this result was consistent across both the Australian and UK jurisdictions (see Table 7). A small minority of Australian respondents, however, some 7.5 percent did not understand *where* to find an outline of their governance duties (just 3.7 percent of the UK sample), while around one in six complained that the governance duties are complex and difficult to keep up with (similar across jurisdictions: 16 percent of the Australian respondents; 18 percent of those in the UK). Some 13.4 percent of Australian respondents reported 'insufficient guidance as to how my governance duties apply in practice' (just 8.3 percent of the UK sample agreeing to this proposition). This is unsurprising given the complexity of the Australian framework and the more detailed guidance provided by the CCEW.

Reassuringly, perhaps, was the finding that very few respondents were 'unaware that I had governance duties' (3.9 percent for Australia; 2.4 percent for the UK): however, while most of this unaware-of-their-responsibilities minority were unpaid/volunteer respondents, there

was a smattering of management and full-time position respondents in the Australian (but not the UK) samples who revealed their ignorance of governance responsibilities.

Table 7: Reasons that make it difficult to understand governance duties

	Australia (% Agree)	Stat test Aust v UK	UK (% Agree)
I do not understand where to find an outline of my governance duties.	7.5	*	3.7
I was unaware that I had governance duties.	3.9		2.4
I feel that the governance duties are complex and difficult to keep up with.	16.0		18.0
I do not understand what the duties mean.	2.8		2.1
I have insufficient time to understand my governance duties.	8.1		7.0
I have insufficient guidance as to how my governance duties apply in practice.	13.4	*	8.3

Notes: Figures sum ‘strongly agree’ with ‘agree’. Statistical tests (third column): * statistically significant at 0.05 level; ** statistically significant at 0.01 level (Chi-square test of independence).

A further group of items (eight in all) asked what would ‘help you to understand and comply with your governance duties’ and suggested several lines of assistance. These suggestions included a Charity Governance Code (with or without a diagnostic tool), an online guide to the governance duties, access to professional advice, mentoring, training, and the availability of practical examples and scenarios.⁷ It is striking that—for all eight items—more

respondents in the Australian sample than the UK agreed that these practical offerings would be welcome. In fact the differences in the proportions welcoming these suggestions by the Australian respondents (over the UK group) were statistically significant on seven out of the eight items (Table 8). For some of the items, the magnitude of the difference is not that great, but others were more striking. For example, 63.4 percent of the Australian sample agreed that access to professional advice would be helpful (against just 48.2 percent for the UK). Mentoring, also, was more welcomed as desirable by the Australian respondents (53.3 percent) than those in the UK (just 37.9 percent). Just under half of those in the Australian sample (45.2 percent) wanted more guidance from the regulator (versus just 31.7 percent for the UK). Some 71.8 percent of the Australian sample indicated they would be receptive to specific training on governance issues (compare this to just 62.1 percent for the UK respondents). For both Australian and UK respondents there was popular support for a detailed online guide setting out all the governance duties of responsible persons. The authors will prepare such a guide.

Table 8: What would help respondents understand and comply with governance duties

	Australia (%)	Stat test Aust v UK	UK (%) Agree)
	Agree)	UK	
Training on the governance duties.	71.8	**	62.1
A Charity Governance Code that sets out general principles for accepted modern practice of good governance.	76.2		73.1

A Charity Governance Code combined with a diagnostic (i.e., self-evaluation) tool for board members to fill in concerning their organisation's performance.	77.0	*	68.2
A detailed online guide that sets out all the governance duties of board members, with an optional self-evaluation tool.	79.5	*	71.3
More guidance from the ACNC/Charity Commission on the governance duties.	45.2	**	31.7
Access to professional advice.	63.4	**	48.2
Practical examples and scenarios showing how the duties are applied.	76.0	**	66.3
Mentoring.	53.3	**	37.9

Notes: Figures sum 'strongly agree' with 'agree'. Statistical tests (third column): * statistically significant at 0.05 level; ** statistically significant at 0.01 level (Chi-square test of independence).

What then, might motivate respondents to comply with governance duties? And how do the two national samples compare? Ascertaining respondents' motives for compliance is instructive in evaluating regulatory and enforcement design and strategies and in assessing potential reforms.⁸ Seven items asked whether various concerns were important or not: the figures in Table 9 sum the 'very important' and 'fairly important' options. These included: concern for the respondent's personal liability; for their personal reputation; for liability or sanction; the organisation's reputation; and respect for the law. Almost all of these rated quite high as motivational factors, for both the Australian and UK samples, and strikingly the

proportion rating them as important was higher for the Australian sample *on all seven items* (three items showed a statistically significant difference between the national samples).

Table 9: Factors that motivate respondents to want to comply with governance duties

	Australia (%)	Stat test Aust v	UK (%)
	Important)	UK	Important)
Concern for my personal liability.	84.2	*	76.2
Concern for my personal reputation.	85.3		80.5
Concern about liability or sanction for the organisation.	97.1	*	93.0
Concern about the organisation's reputation and public perception of the organisation.	98.3		97.0
My personal ethical or social values.	96.5		95.1
To enable optimal decision-making within the organisation.	96.8	*	92.4
Respect for the law.	96.3		95.1

Notes: Figures sum 'fairly important' with 'very important'. Statistical tests (third column): * statistically significant at 0.05 level; ** statistically significant at 0.01 level (Chi-square test of independence).

Handling Conflicts of Interest

Although four-fifths of respondents affirmed that their organisation had an actual conflict of interest *policy* (80.5 percent of Australian respondents; 81.6 percent for the UK), the figures differed on the number of occasions that a board member had actually *declared* a conflict of interest. Only 17.9 percent of the Australian sample answered 'never' (in the past three

years), half that of the UK sample (33.9 percent; a difference that was statistically significant). Conversely more than double the proportion of Australian respondents recalled ‘five or more times’ (in the past three years) than their UK counterparts (33.5 percent, Australia, to 15.5 percent, the UK).

But what of the occasions where a conflict of interest situation did arise within the board of the entity—how had this been managed? A number of questions were asked in reference to such conflicts of interest and respondents were presented with options ranging from ‘always’ to ‘never’: Table 10 lists these courses of action, summing the ‘always’ and ‘usually’ options.

Overall, the responses did not differ greatly between the Australian and UK samples: for example, around 90 percent of both groups noted that the conflicted board member usually or always ‘disclosed the conflict to the board’; about three-quarters of the UK sample noted that the conflicted board member ‘always’ or ‘usually’ ‘abstained from participating in discussion on the matter’ (versus 67.7 percent of the Australians). Higher proportions noted that the conflicted member ‘usually’ or ‘always’ abstained from *voting* on the matter (the proportions were similar in both samples, 86.6 percent of Australians; 83.7 percent of the UK sample). Very rarely was it the case that boards sought guidance (or guidance and authority) from the charities regulator: only 6.3 percent of those in the UK sample reported that the board ‘usually’ or ‘always’ sought such guidance (whereas almost none in the Australian sample did so).⁹ This is interesting given that the CCEW Guidance specifically mentions obtaining independent expert advice, getting advice from the Commission, appointing new trustees, resigning, not making trustee appointments and following any specific requirements in the law or the charity’s governing document.

Table 10: Where a board member has had a conflict of interest, how often has it been managed

	Australia (%)	Stat test Aust v UK	UK (%)
The conflicted board member disclosed the conflict to the board.	89.9		91.9
The conflicted board member abstained from participating in discussion on the matter.	67.7		75.3
The conflicted board member abstained from voting on the matter.	86.6		83.7
The conflicted board member or the board obtained approval from members.	49.3	*	60.2
The conflict was recorded in the organisation's conflicts register (or register of interests).	78.3		78.6
The board obtained independent expert advice.	5.5		9.9
The conflicted board member resigned.	0.8		2.4
The board sought guidance from the ACNC or guidance or authority from the Charity Commission.	0.4	**	6.3
Disclosure of conflicts of interest is a standing item on the agenda of meetings of the board.	74.1		68.1

Notes: Figures sum 'always' with 'usually'. Statistical tests (third column): * statistically significant at 0.05 level; ** statistically significant at 0.01 level (Chi-square test of independence).

Working out which factors *determine* how a conflict of interest should be managed was the subject of the next suite of questions. These factors included: whether the conflict is considered serious or not; the extent to which the conflict affected the conflicted member's ability to decide; whether the conflicted member stood to gain a benefit; whether the organisation's reputation would suffer; and other factors. These are listed in Table 11 along with the sum of those who thought the factor was 'very important' or 'fairly important' (out of a five option suite). None of these factors differed appreciably between the Australian and UK samples and no difference was statistically significant. This is interesting given that, in contrast to ACNC Guidance, CCEW guidance specifically distinguishes between serious and minor conflicts and also mentions all of the factors in Table 11. Perception receives more emphasis in the ACNC Guidance.¹⁰

Table 11: Importance of factors in determining how a conflict of interest should be managed

	Australia (%)	UK (%)
Whether the conflict is serious or minor.	78.5	75.1
The extent to which the conflict affects the board member's ability to decide the matter in the best interests of the organisation.	94.2	92.2
Whether the conflicted board member or an associated/connected person or organisation stands to gain a benefit.	93.6	95.6
The provisions in the organisation's conflicts of interest policy or governing document.	86.1	86.0

Whether there is a perception/appearance of conflict (in the sense of whether an outsider or member of the public might think that the decision might be affected by the conflict of interest).	91.2	89.1
Whether the conflict will affect the charity's reputation.	93.0	93.6
Whether the conflict could affect trust or free discussion between board members.	94.8	91.4
Whether the conflicted board member is regularly affected by this conflict of interest.	83.8	77.7

Notes: Figures sum 'fairly important' with 'very important'. No statistically significant differences between Australian and UK samples across any items (Chi-square test of independence).

Finally, a list was presented to respondents to test whether provision by the organisation of a benefit to certain individuals (identified only by their *relationship* to a conflicted board member) could be adjudged as constituting a conflict of interest. The question asked: 'Which of the following would you classify as a conflict of interest? You are committing your organisation to a transaction which results in a benefit to' and then listed a number of individuals and entities. These included the board member's sibling, spouse, friend, football club and so on: these are listed in Table 12 with the percentage of respondents indicating that the benefit to the individual (or entity) *would* constitute a conflict of interest.

There were two key reasons for testing these. The first is that in terms of the legal tests it is unclear the extent to which the duty to avoid conflicts of interest encompasses non-pecuniary and third party conflicts (see Langford 2020a). In this respect interests of close relatives are generally included within the legal duty and also within concepts such as related (or connected) parties but the inclusion of interests of less close persons is far from clear. For

example, a person's spouse or child would be included within the definition of related party and connected person in both jurisdictions but a nephew or daughter's boyfriend would not be so included (see ACNC n.d.; Charities Act 2011: s. 118; CCEW 2014: 5; AASB 2015). A benefit to a person's football team tests the outer boundary of the concept of conflicts, although the CCEW guidance does mention a situation involving a benefit to an organisation of which a charity trustee is a member (see CCEW 2014: 11). Ascertaining respondents' views on the extent to which conflicts of interest include these types of interest is therefore instructive. These types of conflicts were probed further in the hypotheticals discussed below. The second is that the ACNC Guide specifically includes indirect financial interests and non-financial or personal interests (ACNC 2015a: 12–13) and the CCEW Guide has separate guidance for conflicts of loyalty (which are contrasted with financial conflicts). In general, the proportions from both the Australian and UK samples were fairly high (in affirming that a conflict of interest would occur); there were few notable differences between the two national samples.

Table 12: Which relationship/entity classifies as a conflict of interest if committing the organisation to a transaction in which they benefit

	Australia (%)	Stat test Aust v UK	UK (%)
Your sibling	99.1		98.3
Your spouse	99.1		99.3
Your friend	92.6		89.4
Your nephew	96.6		93.5

The football team you support	56.3	*	47.8
Another entity whose board you serve on	95.7		97.3
Another entity of which you are a member	84.1		84.7
Your daughter	98.8		99.0
Your daughter's boyfriend	93.6	*	88.4
The person or organisation that appointed you	79.1		81.7
Your employer	85.7		90.4
A business in which you are an investor	95.1		95.2

Notes: Response options were either 'yes' or 'no'; table reports percentage answering 'yes'. Statistical tests (third column): * statistically significant at 0.05 level; ** statistically significant at 0.01 level (Chi-square test of independence). (Chi-square test of independence).

Hypothetical Examples on Conflict of Interest

The three final questions on the surveys presented three hypothetical exercises in which a conflict of interest might be extant. Respondents were then asked a series of questions about each of these situations (Tables 13, 14 and 15). It is of interest that very few statistically significant differences (between the Australian and UK samples) were apparent from these exercises.

In the first scenario, the de facto partner of a charity's CEO/trustee was included as one of three entities to quote for work (fixing a window for the charity). Respondents were quite unanimous that the CEO/trustee should declare a conflict of interest, but slightly less unanimous on whether the CEO/trustee should abstain from board discussions and voting. One third of respondents opined that 'more information is needed to make a decision on this scenario'. There was very little difference between the Australian and UK respondents (Table 13).

Table 13: Hypothetical example on conflict of interest (I)

Rachel is a CEO/trustee of 'Rising Suns', a charity that runs ballet classes for children with mental health issues. The windows of the charity's premises have been badly damaged in a thunderstorm. Rachel's de facto partner, Zac, runs a successful window company. Rachel has no involvement in the company. The board is considering whether to engage Zac's company to fix the windows. The charity obtains three quotes from window companies, including one from Zac's company. Please indicate which of the following statements you agree with.

	Australia (%)	Stat test Aust v UK	UK (%)
Rachel should declare a conflict of interest.	99.1		100.0
Rachel should abstain from being involved in discussions and voting.	94.2		94.8
Rachel does not have a conflict of interest because she does not have a direct interest in Zac's company—she can therefore participate in the decision.	3.7		5.2
If Zac's company provides the lowest quote, then the contract is on arm's length terms and there is no need for Rachel to declare a conflict.	3.4	**	8.7

It depends on other factors—more information is needed to make a decision on this scenario.	33.0	35.6
---	------	------

Notes: Response options were either ‘agree’ or ‘disagree’; table reports percentage answering ‘agree’. Statistical tests (third column): * statistically significant at 0.05 level; ** statistically significant at 0.01 level (Chi-square test of independence).

In a second hypothetical, a board member of a counselling charity offers the free services of her brother to the organisation. The brother, however, ‘gains’ a benefit since the hours he provides assist toward his course accreditation. Unanimity was less forthcoming in this example; and other than one item, there is little discernible difference between the Australian and UK respondents. Tellingly, one in eight Australian respondents did *not* think the board member had a conflict of interest; with the UK sample, this rose to one in six. Nevertheless, respondents on the whole believed the relationship *would* certainly affect the affected board member’s decision-making. The only point of difference between respondents from the two regions concerned whether a member of the public might perceive that the board member had a conflict and should therefore declare the conflict: 92.4 percent of the Australian sample thought the public would view this as a conflict of interest—only 86.8 percent of the British respondents agreed (Table 14).

Table 14: Hypothetical example on conflict of interest (II)

The charity, ‘Listening for Life’, has decided that it should seek the services of additional counsellors. Caroline is a board member of Listening for Life. Her brother, Edgar, provides counselling to individuals affected by suicide. During a board meeting Caroline offers to ask Edgar to provide counselling services to the charity for free. Although Edgar will not be paid for the counselling services he provides, he will benefit from the practice hours, which will go towards his course accreditation. Please indicate which of the following statements you agree with.

	Australia (%)	Stat test Aust v UK	UK (%)
Caroline has a conflict of interest.	87.3		83.2

Caroline does not have a conflict of interest because the charity is getting something for free.	10.8		14.6
Caroline does not have a conflict of interest because she is not getting any benefit personally.	14.2		16.8
Caroline does not have a conflict of interest because a potential benefit to Edgar is unlikely to affect her decision-making.	14.2		18.5
Caroline does not have a conflict of interest because there is no financial benefit involved.	13.6		13.7
A member of the public might perceive that Caroline has a conflict and she should therefore declare the conflict of interest.	92.4	*	86.8

Notes: Response options were either ‘agree’ or ‘disagree’; table reports percentage answering ‘agree’. Statistical tests (third column): * statistically significant at 0.05 level; ** statistically significant at 0.01 level (Chi-square test of independence).

Finally, a more straight-forward conflict of interest scenario was presented as the third hypothetical, but the questions were more nuanced. A board member is asked to provide professional services (through her private company); further, she would be paid at the going rate for her advice. Overwhelming, as might be expected, respondents identified this scenario as a definite conflict of interest, and very little difference between Australian and UK respondents was apparent. However—and even though a conflict of interest was conceded by (virtually) all—the decision, in the face of a conflict of interest, was not necessarily overly problematic. Few entertained the possibility of the conflicted board member actually *voting* on the decision, but only one in five would have her excluded from board *discussions* on the

matter. In addition, more than half thought that the board member's 'insight and thoughts' and 'participation' be permitted, although excluded from the actual board vote (half of all Australian respondents; 60 percent of the UK sample). We note the contradiction between these figures and the 82% of respondents (81.5% of Australian respondents; 81.7% of the UK sample) who said that the board member should withdraw from discussion during the meeting, unless the view was that the board member give her insights and then withdraw from subsequent board discussion. Nearly one in four thought it sufficient for the board member to 'enter her involvement in her company in the charity's register of interests'. (Table 15).

Table 15: Hypothetical example on conflict of interest (III)

The charity 'Teachers for Change' requires specialist advice on hiring casual teachers. One of the charity board members, Tran, is an expert in relation to hiring casual teachers and runs a successful company which advises on this issue. The board of the charity decides to engage Tran's company to provide expert advice. Tran's company is one of a number of companies that specialise in the area and it provides the expert advice at the going rate. Please indicate which of the following statements you agree with.

	Australia (%)	Stat test Aust v UK	UK (%)
There is nothing that Tran needs to do because the advice is provided at the going rate—there is therefore no conflict of interest that needs to be declared.	3.2		4.0
It is enough for Tran to enter her involvement in her company in the charity's register of interests.	23.2		22.3
The charity should get quotes from at least two other companies to determine which is the best value.	94.3		96.4

Tran should declare her interest in her company at the meeting at which the charity's board decides which company to engage to provide the services.	97.2		98.2
Tran should withdraw from discussion during the meeting.	81.5		81.7
Tran should not vote on the decision as to which company is engaged to provide the services.	97.8		97.5
It would be helpful to have Tran's insight and thoughts during the board meeting at which the decision is made as to which company to engage to provide the services—Tran should therefore participate but she should not vote.	50.5	*	60.0
It depends on other factors—more information is needed to make a decision on this scenario.	36.4		40.8

Notes: Response options were either 'agree' or 'disagree'; table reports percentage answering 'agree'. Statistical tests (third column): * statistically significant at 0.05 level; ** statistically significant at 0.01 level (Chi-square test of independence).

Discussion

Overall, around 135 items were common to the Australian and UK surveys (additional items were probed on the UK survey). This number includes a slew of variables from the open-ended items that were converted to quantifiable data. In addition, some new items were created from principal component analysis factors, and two indices were computed from a collation of binary items.

As a matter of summary: of these 135 tests, forty (or 29.6 percent) returned statistically significant differences between the Australian and UK samples. The greatest concentration of difference, however, concerned the *demographics* (characteristics of either the charitable entity itself, or the respondents answering for themselves). Forty percent of the differences between the demographics of the Australian and UK responses were statistically significant. Among the notable important differences between the two jurisdictions are: the legal structure of the entities (the company structure accounting for 28.7 percent of the Australian sample as against just 12 percent of the UK; and the fact that almost a quarter of the UK entities were organised as trusts; Table 1); age level of respondents (three quarters of the UK sample aged 55 or over as against just under two-thirds of the Australians; Table 4); and level of volunteerism (a higher proportion of Australian respondents reporting they are paid full-time; three-quarters of the UK group were volunteers as against just over half of the Australians; Table 5).

By way of contrast, responses to questions related to *opinions, knowledge and outlooks* of the respondents (about charity governance, conflicts of interest and similar questions) reflected a *marked similarity of outlook* across the two jurisdictions. Of the 80 items relevant, 23 reported a statistically significant difference between the two regions (28.8 percent).¹¹

When tallying the differences between agreement to (mostly) likert items between the Australian and UK groups, the average was just 4.1 percentage points (with a median of 3.0). So, as an example, to the question whether or not a conflicted board member abstained from voting on a matter (third item in Table 10), 86.6 percent of the Australian sample reported an abstention ‘always’ or ‘usually’—highly similar to that of the UK sample (83.7 percent). The

difference between the UK and Australia on this result (just 2.9 percentage points), is pretty much the median value (3.0) for all 80 items relevant to opinions, knowledge and outlooks.

Noticeably, the (quantitatively derived) items calculated from the *open-ended items* (a mixture of factual and opinion items) also reported high levels of similarity: just four out of 26 items returned a statistically significant difference between the two geographical areas.

An important finding of interest concerned the *high level of agreement* (in both the Australian and UK questions) to many propositions relating to governance duties (Table 6), and motivations for compliance with good governance (Table 9). In addition, this was also true with respect to the numerous questions that probed ‘conflict of interest’ issues (Tables 11 through 15). In many cases, these attracted figures in the mid to high 90 percent levels consistently. In other words, respondents, overall, were, uniformly highly sensitive to the issues of conflict of interest.

Yet while acknowledging the overall similarity between respondents of the two regions, nevertheless there exist some marked differences that call for comment. As mentioned, some 23 items reported statistically significant differences (the asterisked items in Tables 6 to 15). However, given the appreciable differences in the demographic makeup of both the entities and the respondents (*vis-à-vis* the Australian versus the UK samples) it could be argued that it is these demographic divergences (especially those presented in Tables 1, 4 and 5) that account for the international distinctiveness. To check this, we ran regressions on all 23 items (mostly Ordinary Least Square multiple regression, and where more appropriate, logistic regression) to factor out the influence of legal structure, age, time spent on the board, and employment status. In all but three regressions¹² the international factor (whether Australia or

UK) was *still* statistically significant: this validates the finding that cultural, legal and tradition environment of the respective national settings have a key part to play in determining opinions, knowledge and outlooks of the responses to governance and conflicts of interest. Perhaps most striking of all, responses to items concerned with that which would assist respondents to understand and comply with governance duties (Table 8) differed the most between the UK and Australian samples: of the eight items, seven were statistically significant, and these seven also held up when demographics were filtered out in multiple regression analysis.

Conclusions

Interestingly, the complexity of the Australian charities framework (and, in particular, the multiple and overlapping governance and reporting requirements) did not appear to be significant in terms of differences between respondents' perceptions of their understanding of their duties. In both countries, however, there appears to be a disconnect between this perception and the observance of governance duties in practice given that conflicts of interest are not declared as frequently as could be expected given the sizeable average number of responsible persons on boards. This suggests a potential need for tighter formal processes and encouragement of abstention. Australian respondents were, however, more interested in practical help and there were multiple comments from Australian respondents (but not from UK respondents) about complexity and also about other responsible persons not understanding and complying with their duties. In both jurisdictions respondents extend the concept of conflict of interest potentially further than the legal concept extends in terms of the reach of third party and non-pecuniary conflicts, although CCEW and ACNC guidance on conflicts of interest also gives the concept an expansive reach.

In both jurisdictions the most popular practical option to assist with understanding and complying with governance duties is an online guide setting out all the relevant governance duties, and we will be preparing such a guide. Interestingly, despite CCEW guidance being specific about factors that influence how a conflict should be dealt with and steps to be taken by charity trustees (in contrast to ACNC Guidance) and despite the fact that a larger majority of UK respondents had read the guidance, there was not a great deal of difference between the answers of respondents from each jurisdiction. Motivations were also not materially different.

A persistent theme in the Australian comments was the problems caused by complexity, inconsistency and change. These included comments on proliferation of standards within and across governments, multiple reporting requirements, as well as problems caused by the turning off of the duties in the Corporations Act. There was also a noteworthy theme of the burden of red tape. Another noticeable sentiment was that, although the respondent felt that they understood their governance duties, other responsible persons did not. Time constraints were also raised in the comments. These comments align with the data in Table 8, which indicates Australian respondents' greater receptiveness to assistance with understanding and complying with the duties, despite the fact that the majority had received training and guidance in relation to their governance duties (Table 6).¹³

REFERENCES

Legislation

Australian Charities and Not-for-profits Commission Act 2012 (Cth) (ACNC Act 2012).

Australian Charities and Not-for-profits Commission Regulation 2013 (Cth) (ACNC Regulations 2013).

Charities Act 2011 (UK)

Charities Act 2013 (Cth)

Corporations Act 2001 (Cth)

Companies Act 2006 (UK)

Cases

Children's Investment Fund (UK) v Attorney General (SC(E)) (Lehtimäki v Cooper) [2020]

UKSC 33; [2022] AC 155

Other

Aroney, N. & Turnour, M. (2017). Charities are the New Constitutional Law Frontier.

Melbourne University Law Review, 41(2): 446–492.

Australian Accounting Standards Board. (2015). *AASB Standard: Related Party Disclosures*

(AASB 124) (AASB 2015).

Australian Charities and Not-for-profits Commission. (n.d.). *Related Party Transactions*.

Available from: <https://www.acnc.gov.au/related-party-transactions>. [9 March 2022]

(ACNC n.d.).

Australian Charities and Not-for-profits Commission. (2015a). *Managing Conflicts of*

Interest: A guide for charity board members (ACNC 2015a).

Australian Charities and Not-for-profits Commission. (2015b). *Charity Compliance Report*

December 2014 and Beyond (ACNC 2015b).

Australian Charities and Not-for-profits Commission. (2017). *Charities Compliance Report*

2015 and 2016 (ACNC 2017).

Australian Charities and Not-for-profits Commission. (2018). *Charity Compliance Report*

2017 (ACNC 2018).

- Australian Charities and Not-for-profits Commission. (2019). *Charity Compliance Report 2018* (ACNC 2019).
- Brand, V., Fitzpatrick, J. & Lombard, S. (2013). Governance and Not-for-Profits: Regulatory reform. *Flinders Law Journal*, 15(2): 381–410.
- Charity Commission England and Wales. (2012, updated 2018). *The Essential Trustee: What you need to know, what you need to do (CC3)* (CCEW 2012).
- Charity Commission England and Wales. (2014). *Conflicts of Interest: A guide for charity trustees (CC29)* (CCEW 2014).
- Charity Commission England and Wales. (2020). *Five Minute Guide: Managing conflicts of interest in a charity* (CCEW 2020).
- Chelliah, J. et al. (2016). Governance Challenges for Not-for-Profit Organisations: Empirical evidence in support of a contingency approach. *Contemporary Management Research*, 12(1): 3–23.
- Freiberg, A. (2017). *Regulation in Australia*. Leichhardt: Federation Press.
- Heesh, J. & Lobow, J. (2015). Uncertain Times for Volunteer Directors. *Governance Directions*, 67(4): 236–238.
- Langford, R. T. (2020a). Conflicts and Coherence in the Charities Sphere: Would a conflict by any other name proscribe the same? *Journal of Equity*, 14(1): 1–31.
- Langford, R. T. (2020b). Purpose-Based Governance: A new paradigm. *University of New South Wales Law Journal*, 43(3): 954–976.
- Moi, S. et al. (2014). Empirical Research on Nonprofit Boards: Main features and differences from the literature on corporate and public boards. In L. Gnan et al. (eds), *Mechanisms, Roles and Consequences of Governance: Emerging issues*: 127–158. Bingley: Emerald.
- Murray, I. (2019). Regulating Charity in a Federated State: The Australian Perspective. *Nonprofit Policy Forum*.

- Nielsen, V. L. & Parker, C. (2012). Mixed Motives: Economic, social and normative motivations in business compliance. *Law & Policy*, 34(4): 428–462.
- Parker, C. & Nielsen, V. L. (2017). Compliance: 14 questions. In P. Drahos (ed.), *Regulatory Theory: Foundations and Applications*: 217–232. Acton: ANU Press.
- Ramsay, I. & Webster, M. (2017). Registered Charities and Governance Standard 5: An evaluation. *Australian Business Law Review*, 45(2): 127–158.
- Woodward, S. & Marshall, S. (2004). *A Better Framework – Not-for-Profit Regulation*. Centre for Corporate Law and Securities Regulation, University of Melbourne.

NOTES

¹ The survey was developed after a detailed search of multiple legal, business and multidisciplinary databases and books to identify previous empirical studies on conflicts of interest in Australia, the UK and other common law jurisdictions in the charities, not-for-profit and commercial sectors.

² The surveys provided the following definition: ‘The term “governance duties” refers to the duties and responsibilities you have as a board member [or charity trustee] in making decisions and in overseeing the organisation. Governance duties include, for example, obligations relating to conflicts of interest and financial management.’ The survey questions in each jurisdiction were largely identical, although there were small differences in terminology at some points and the UK survey included extra questions on the Charity Governance Code (see n 7 below).

³ In both jurisdictions the extent to which the general law conflicts rule encompasses non-pecuniary and third party conflicts is unclear (for discussion, see Langford 2020a) but ACNC and CCEW guidance clearly include such conflicts within the purview of conflicts that need to be disclosed and managed.

⁴ Note that the descriptor ‘UK’ will be used for short to refer to respondents from England and Wales.

⁵ Interestingly, of those established as a *company*, two-thirds of the Australian entities had ‘Limited’ in their name, contrasting clearly with those in the UK: only one-third of entities with the ‘company’ legal structure had the word ‘Limited’ in their name. In Australia such companies are exempted from the related party regime in ch. 2E of the *Corporations Act 2001*; see also, s. 150. In the UK see Companies Act 2006, s. 60.

⁶ This difference was not, however, statistically significant.

⁷ England and Wales already has a Charity Governance Code. In testing knowledge of this Code, a minority of the UK respondents were not even aware of the Code (13.2 percent), while a similar number, while aware, had not read it (12.8 percent). The majority, however, had read some or all of the Code (74.0 percent). Of those who reported having read the Code, a fraction either ‘do not use it’ (3.3 percent) or ‘do not find it helpful or useful’ (4.1 percent). The vast majority of UK respondents who were aware of the Code reported finding it ‘of some use and helpful’ (71.9 percent) or ‘highly useful and helpful’ (20.7 percent).

⁸ There is, of course, a wealth of regulatory scholarship on compliance motives—for summary and appraisal see Nielsen & Parker 2012; see also, Freiberg 2017: 382–384; Parker & Nielsen 2017.

⁹ The Australian survey question asked about guidance from the ACNC, whereas the UK survey question asked about guidance and authority from the Charity Commission.

¹⁰ Note also that Governance Standard 5 indirectly requires disclosure of perceived or actual material conflicts of interest—see ACNC Regulations 2013: reg. 45.25(2)(e). The Australian survey question asked about perception of conflict and the UK survey question asked about appearance of conflict.

¹¹ Scales and indices, on the other hand, generally reflect a heightened sensitivity, so it is of interest that of the thirteen calculated from these items, almost half (46.2 percent) were statistically significant.

¹² Neither of the asterisked items in Table 7 (‘I do not understand where to find an outline of my governance duties’ and ‘I have insufficient guidance as to how my governance duties apply in practice’) indicated a statistically significant t-stat for the UK dummy item in OLS regressions. And neither was one item in Table 12 (‘Your daughter’s boyfriend’). Two further items were significant at the 0.10 level: one item in Table 9 (‘Concern about liability or sanction for the organisation’; $p=0.0589$), and one item in Table 14 (‘A member of the public might perceive that Caroline has a conflict and she should therefore declare the conflict of interest’; $p=0.0626$).

¹³ Although very few Australian respondents indicated that they did not understand where to find an outline of their governance duties (7.5 percent) and/or had insufficient guidance as to how their governance duties applied in practice (13.4 percent), somewhat more Australian respondents were in the dark than their UK counterparts (3.7 percent and 8.3 percent for UK respondents respectively: Table 7).